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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-81

VETERANS AND RESERVISTS FOR PEACE IN VIETNAM,

Petitioner,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITIONER'S REPLY BRIEF

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The government's brief in opposition to the petition for certiorari treats the facts inaccurately.

It states (Res. Br. 2-3) that the letter notifying petitioner of the detention contained a statement that a Foreign Assets Control license "was obtainable within 90 days of notification." In fact, the letter stated that Customs would retain the publications for a maximum of ninety days while a license was sought. The footnote on page 2 of respondents' brief states that the package was sent by "the principal propaganda organization for the North Vietnamese Government" a fact which, if true, appears nowhere in the record and is hardly a matter of judicial notice.

In footnote 2, page 3, of respondents' brief it is stated that "Mainland China and North Korea, both of which were on the list of designated hostile countries [covered by

the Foreign Assets Control Regulations] when this suit was commenced, have recently been removed from the list." In fact, although many of the restrictions against China were removed on May 7, 1971, North Korea's status remains the same as that of North Vietnam.

Of even more importance, the government asserts (Res. Br. 9) "And the publications are available at 'universities, libraries [and] research and scientific institutions' * * * which are permitted to receive them without restriction as to payment," citing 31 C.F.R. §500.204 App. ¶108. That provision of the Regulations (reproduced in the appendix to the petition for certiorari at 4a) authorizes the issuance of licenses to universities, libraries, research and scientific institutions only "under programs approved by the Librarian of Congress or the National Science Foundation." So far as we have been able to determine, no such programs have ever been set up or approved, and the implication that the publications are easily accessible to members of the public, let alone scholars, is simply not true. Even if such programs existed, the publications would be those selected by the institutions, and their availability at scattered institutions would not justify denying citizens the right to receive them by mail.

At page 10, footnote 9, of its brief the government asserts as a fact that licenses will be granted for publications upon the applicant's bare statement that they are gifts, citing the opinion below. The statement by the Third Circuit, however, was no more than an expression of how the court hoped the Regulations would be administered, without any basis in fact. The Regulations provide that licenses shall be issued for films and publications "when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers," clearly imposing a burden of proof on the

applicant. Foreign Assets Control has adopted that interpretation and requires the furnishing of complete details before issuing such licenses. This was shown in the petition for certiorari in *Teague* v. *Regional Commissioner,* No. 1061, October Term 1968, pages 4, 5, and most recently in *American Documentary Films, Inc.* v. *Secretary of the Treasury,* S.D.N.Y., No. 72 Civ. 1711, decided July 5, 1972 (cited by respondents at page 10 of their brief), where the district court opinion recites at length the efforts of Foreign Assets Control to obtain proof that the subject material constituted gifts despite statements by the applicant that no payment was involved.[1]

In the present case the government did not deny or even qualify petitioner's assertion that the applicant bears the burden of proof that publications are bona fide gifts. It is this record which is before the Court. The government has seized upon dictum of the court below, unsupported by the record or extrinsic facts, to describe its own procedures in a manner contrary to actual practice and contrary to the undenied assertions in the record.

Respondents, following the opinion of the Third Circuit, seek to distinguish *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), relying on the statement in the concurring opinion, 381 U.S. at 308-309, that the statute there in issue was not required by any compelling public interest, while the

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[1] *American Documentary Films* involved the denial of a license to import films from Cuba (affected by the Cuban Assets Control Regulations, 31 C.F.R. Part 515, which are essentially the same as the Regulations here in issue), which Foreign Assets Control apparently suspected were not bona fide gifts. But there the applicant had also sought a license to import posters, which was granted after "The Office of Foreign Assets Control asked a number of questions designed to assist in clarifying the issue of whether or not there would be any direct or indirect commercial benefit to Cuba from the purported transaction." Typewritten opinion, p. 7.

opposite is true of the regulations here in issue (Res. Br. 5-6). Yet the statute challenged in *Lamont,* 39 U.S.C. §4008, was an act of Congress, passed after extensive committee hearings. As such it embodied the national policy of the United States, solemnly and deliberately arrived at. In contrast, the Regulations are no more than the unilateral act of the Secretary of the Treasury. For a court to decide that regulations promulgated by a cabinet member are "more important" than an act of Congress is, we submit, a presumptuous and dangerous approach to relationships between different branches of the government. While the implied premise is that the hostilities in Vietnam justify whatever regulation the Executive Department believes appropriate, the Regulations were equally applicable to China and North Korea, and similar regulations apply to Cuba. It is therefore patent that the only justification for the Regulations is their implementation of a foreign policy which seeks to deny to certain countries the benefits of commercial intercourse. The conflict in Vietnam cannot be the basis for restricting trade with North Korea and Cuba.

The government argues that censorship is not the motivating factor in its restrictions, as all publications are subject to the Regulations, regardless of content. It is surely a matter of notice, however, that unsolicited publications from North Vietnam, China, North Korea and Cuba are far more likely than not to contain political opinion. Censorship is inevitably the result.

The government devotes its principal argument to the applicability of *United States* v. *O'Brien,* 391 U.S. 367 (1968). The broad language of *O'Brien* must be considered in the context of the issue there decided: the burning of a draft card as a form of political protest. To read *O'Brien* as upholding *any* restriction of First Amendment rights

so long as a governmental interest can be found which is "unrelated" to the suppression of those rights would overrule many landmark cases. The anti-littering laws were directed at garbage, not free speech, to cite only one example. Almost any restriction on free speech could easily be cast in terms which made that restriction appear "incidental" to some proper governmental purpose.

But even if the language of *O'Brien* is to be mechanically applied to all situations, it must be applied whole. And an essential ingredient in upholding regulation of speech under *O'Brien* is that "the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest," 391 U.S. at 377. The respondents' brief is pointedly silent with respect to the obvious alternative, noted at page 9 of the petition, of relying on the criminal sanctions of the statute, rather than licensing, to prevent payment for publications. The requirement in *O'Brien* that only the least instrusive interference with First Amendment rights is permissible is emphasized by Mr. Justice Harlan's concurrence in which he stressed that other means of expression were available and that an important question would be presented if an "incidental" regulation of speech "has the effect of entirely preventing a 'speaker' from reaching an audience with whom he could not otherwise lawfully communicate," 391 U.S. at 388-389.

The government's brief rejects the suggestion, at page 11 of the petition for certiorari, that the statute be construed to exclude publications, so that constitutional questions might be avoided. It argues that excepting publications from purview of the Regulations would result in greater interference with First Amendment rights, because then all

packages would have to be examined to determine whether they contained publications which are entitled to delivery (Res. Br. 12). Obviously all packages are examined under the existing program, and there would be no greater burden on Customs than under the present program, and a far lesser burden on the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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